# Ahmad Farid bin Mohammad Nasir v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-OS(M)-278–07 OF 2019
NOR BEE ARIFFIN, GUNALAN MUNIANDY AND HASHIM HAMZAH JJCA
27 APRIL 2022

*Criminal Procedure — Conviction — Whether conviction of accused safe — Whether prosecution had proven beyond reasonable doubt that accused fired gun with intent to kill while committing robbery — Whether ownership of gun was not material or relevant to the charge — Whether accused's conduct or information that led police to recovery of gun were admissible in evidence*

The appellants in the two appeals herein ('A1' and 'A2') were jointly charged together with another person ('Nik') under s 3 of the Firearms (Increased Penalties) Act 1971 ('the FIPA') with discharging a firearm with intention to kill a man ('SP5') while carrying out a robbery on a highway one night in January 2014. According to the prosecution's case, SP5 was with his wife ('SP7') in a car he was driving on the highway on the night in question when a sports utility vehicle ('SUV') collided into their rear. Both the vehicles then stopped by the road-side. As SP5 was inspecting the rear of his car, the appellants emerged from the SUV. SP5 approached A1 and demanded compensation for his dented rear bumper. While SP5 was still inspecting his vehicle, A1 suddenly jumped into the driver's seat of SP5's car while A2 rushed back to the SUV. As SP5 was trying to pull A1 out of his car, he noticed a gun in A1's hand. A1 shot SP5 at the waist, causing him to fall backwards. A1 then sped off with SP7 still in the car and the SUV followed them. Despite his injury, SP5 walked to the nearest petrol station where he got help to go to hospital for treatment. At the hospital, a bullet was recovered from the wound site and handed over to police. The bullet had entered the front part of SP5's waist and existed at the left buttock. Police later found SP7 unharmed at a road-side while SP5's car was found abandoned in another area. Police arrested A1 about a week later and he led police to the recovery of a revolver and bullets. The pistol and bullets were handed over to police by one Najmi Daniel. A police ballistics expert's test confirmed that the bullet recovered from SP5 had been fired from the revolver. At the end of the prosecution's case, the trial judge acquitted and discharged Nik but called on the appellants to make their defence. A1 denied robbing or shooting SP5. He claimed that at the time there were two others in the SUV apart from himself, A2 and Nik, and that while he was trying to remove the car keys from SP5's car, SP5 attacked him and just then he heard a gunshot ring out and saw SP5 falling to the ground. Fearing something bad had happened, A1 said he sped off in the car and later left SP7

by a road-side. The trial judge found that the appellants had failed to cast a reasonable doubt on the prosecution's case and convicted them and sentenced them to death. In his instant appeal against conviction and sentence, A1 argued that the trial judge had: (a) failed to consider that the prosecution had not proven the element of robbery in the charge. A1 maintained that he had only committed theft (which was not a scheduled offence for the purposes of s 3 of FIPA) of SP5's car and the discharge of the firearm was after the offence of theft had been completed; (b) erred in not invoking adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 ('the EA') for not calling Najmi Daniel to testify as it left the question of the ownership of the revolver unanswered; and (c) erred in admitting as evidence under s 27 of the EA: (i) Najmi Daniel's statement to the police that A1 had asked him to keep the revolver; and (ii) A1's statement to the police that he had given the revolver to Najmi Daniel to keep.

**Editorial Note:** The following grounds of decision are only in relation to A1 as the prosecution did not appeal against A2's acquittal.

**Held**, unanimously dismissing A1's appeal and affirming his conviction and sentence; allowing A2's appeal and acquitting and discharging him of the charge:

(1) In determining whether A1 had discharged the firearm whilst committing robbery, the whole incident had to be viewed as a single transaction. In his defence, A1 did not deny that the firearm was discharged when SP5 was trying to pull A1 out of his car. The whole incident was witnessed by SP7. After shooting SP5, A1 immediately drove away in SP5's car. A1 denied shooting SP5 and claimed that the shot came from somewhere else. Based on the evidence, this was highly incredible because the nature of SP5's gunshot wound showed that he was shot from the front and not from the side or from behind while SP5 was trying to pull A1 out of his car and the fact that there was no one else in the car except A1 and SP7. It could therefore be safely concluded that SP5 was shot by none other than A1. The firearm was discharged while the offence of robbery was being completed. The robbery was completed when A1 drove away in SP5's car after shooting him. A1 was not merely trying to escape when he shot SP5. In addition, A1's act of shooting at SP5 clearly indicated A1's intention was to cause death or serious injury to SP5. Therefore, the prosecution had established all the elements of the charge against A1 and there was no misdirection on the part of the trial judge in this regard (see paras 33–39).

(2) The ownership of the revolver was not material or relevant to the charge against A1. The trial judge was satisfied on the evidence that SP5 and SP7 were credible witnesses and that their evidence that it was A1 who pulled the trigger remained convincing and unshaken. There was no question of withholding of evidence because the prosecution did offer Najmi Daniel

to the defence but A1 never called him as his witness. There was therefore no misdirection on the trial judge's part in not invoking adverse inference against the prosecution for not calling Najmi Daniel as a prosecution witness (see paras 46–50).

(3) While Najmi Daniel's statement to the police that A1 had asked him to keep the revolver was not admissible in evidence because he was never called to testify, the court agreed with the prosecution that nothing in the trial judge's grounds of decision showed that he had relied upon that information given by Najmi Daniel to find A1 guilty of the charge. Hence, there was no merit in this issue raised by A1 (see paras 52–53).

(4) With regard to A1's statement to the police that he gave the revolver to Najmi Daniel to keep, the report containing that statement was never shown to its maker when he was testifying, hence that purported statement by A1 should not have been admitted into evidence or considered by the trial court (see para 54).

(5) A1's conduct in leading police to the discovery of the revolver was admissible under s 27 of the Evidence Act 1950 ('the EA'). Even if the information supplied by A1 was inadmissible under s 27, the evidence that A1 had pointed out the place from where the revolver was eventually discovered was relevant and admissible under s 8 of the EA. The prosecution's evidence had also established that the revolver was the one used during the commission of the offence in the instant case. On the totality of the evidence, A1's conviction was safe (see paras 58–59, 61 & 63).

**[Bahasa Malaysia summary**

Perayu-perayu di dalam dua rayuan di sini ('A1' dan 'A2') didakwa bersama-sama dengan orang lain ('Nik') di bawah s 3 Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta SAPLB') dengan menggunakan senjata api dengan niat untuk membunuh seorang lelaki ('SP5') semasa melakukan rompakan di lebuh raya satu malam pada Januari 2014. Menurut kes pendakwaan, SP5 bersama isterinya ('SP7') di dalam kereta yang dipandunya di lebuh raya pada malam berkenaan apabila kenderaan utiliti sukan ('SUV') bertembung di belakang mereka. Kedua-dua kenderaan tersebut kemudian berhenti di tepi jalan. Ketika SP5 sedang memeriksa bahagian belakang keretanya, perayu muncul dari SUV. SP5 mendekati A1 dan menuntut pampasan untuk bumper belakangnya yang bengkok. Semasa SP5 masih memeriksa kenderaannya, A1 tiba-tiba melompat ke tempat duduk pemandu kereta SP5 sementara A2 bergegas kembali ke SUV. Ketika SP5 cuba menarik A1 keluar dari keretanya, dia melihat pistol di tangan A1. A1 menembak SP5 di pinggang, menyebabkan dia jatuh ke belakang. A1 kemudian melarikan diri dengan SP7 masih di dalam kereta dan SUV mengikuti mereka. Walaupun mengalami kecederaan, SP5 berjalan ke stesen minyak terdekat di mana dia mendapat bantuan untuk pergi

ke hospital untuk mendapatkan rawatan. Di hospital, peluru ditemui dari dalam luka mangsa dan diserahkan kepada polis. Peluru tersebut telah memasuki bahagian depan pinggang SP5 dan ditemui di punggung kiri. Polis kemudian mendapati SP7 tidak diapa-apakan di tepi jalan manakala kereta SP5 ditemui ditinggalkan di kawasan lain. Polis menahan A1 kira-kira seminggu kemudian dan dia membawa polis ke penemuan senjata pistol revolver dan peluru. Pistol dan peluru tersebut diserahkan kepada polis oleh Najmi Daniel. Ujian pakar balistik polis mengesahkan bahawa peluru yang ditemui dari SP5 telah dilepaskan dari revolver tersebut. Pada akhir kes pendakwaan, hakim bicara membebaskan dan melepaskan Nik tetapi memanggil pembelaan perayu-perayu. A1 menafikan merompak atau menembak SP5. Dia mendakwa bahawa pada masa itu terdapat dua orang lain di dalam SUV selain dirinya, A2 dan Nik, dan semasa dia cuba mengeluarkan kunci kereta dari kereta SP5, SP5 menyerangnya dan ketika itu dia mendengar bunyi tembakan keluar dan melihat SP5 jatuh ke tanah. Takut sesuatu yang buruk telah berlaku, A1 berkata dia melarikan diri di dalam kereta dan kemudian meninggalkan SP7 di tepi jalan. Hakim bicara mendapati bahawa perayu telah gagal menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan mensabitkan mereka dan menjatuhkan hukuman mati kepada mereka. Dalam rayuan ini terhadap sabitan dan hukuman, A1 berhujah bahawa hakim bicara telah: (a) gagal untuk mempertimbangkan bahawa pihak pendakwaan tidak membuktikan unsur rompakan dalam pertuduhan tersebut. A1 berpendapat bahawa dia hanya melakukan kecurian (yang bukan kesalahan berjadual untuk tujuan s 3 Akta SAPLB) kereta SP5 dan pelepasan senjata api tersebut adalah selepas kesalahan kecurian telah selesai; (b) terkhilaf kerana tidak membangkitkan anggapan berbalik terhadap pendakwaan di bawah s 114(g) Akta Keterangan 1950 ('AK') kerana tidak memanggil Najmi Daniel untuk memberi keterangan kerana ianya menimbulkan persoalan pemilikan revolver yang tidak dijawab; dan (c) terkhilaf dalam menerima keterangan di bawah s 27 AK: (i) Kenyataan Najmi Daniel kepada polis bahawa A1 telah meminta beliau untuk menyimpan revolver tersebut; dan (ii) kenyataan A1 kepada polis bahawa dia telah memberikan revolver tersebut kepada Najmi Daniel untuk disimpan.

**Nota Editorial**: Alasan-alasan penghakiman ini hanya berkaitan dengan A1 memandangkan pendakwaan tidak merayu atas pembebasan A2.

**Diputuskan**, sebulat suara menolak rayuan A1 dan mengekalkan sabitan dan hukuman; membenarkan rayuan A2 dan melepaskan dan membebaskannya dari pertuduhan:

(1) Dalam menentukan sama ada A1 telah melepaskan senjata api semasa melakukan rompakan, keseluruhan kejadian harus dilihat sebagai satu transaksi. Di dalam pembelaannya, A1 tidak menafikan bahawa senjata api tersebut dilepaskan ketika SP5 cuba menarik A1 keluar dari keretanya. Seluruh kejadian ini disaksikan oleh SP7. Selepas menembak

SP5, A1 segera memandu kereta SP5. A1 menafikan menembak SP5 dan mendakwa bahawa tembakan tersebut datang dari tempat lain. Keterangan ini adalah kukuh berdasarkan keadaan luka tembakan SP5 menunjukkan bahawa dia ditembak dari depan dan bukan dari sisi atau dari belakang sementara SP5 cuba menarik A1 keluar dari keretanya dan tiada orang lain di dalam kereta kecuali A1 dan SP7. Oleh itu, dapat disimpulkan bahawa SP5 ditembak oleh A1. Senjata api tersebut dilepaskan sementara kesalahan rompakan sedang berlaku. Rompakan tersebut selesai apabila A1 memandu di dalam kereta SP5 selepas menembaknya. A1 tidak hanya mencuba untuk melarikan diri ketika menembak SP5. Di samping itu, tindakan menembak A1 di SP5 jelas menunjukkan niat A1 bertujuan menyebabkan kematian atau kecederaan serius kepada SP5. Oleh itu, pihak pendakwaan Berjaya membuktikan semua elemen pertuduhan terhadap A1 dan tiada kekhilafan di pihak hakim perbicaraan di dalam hal ini (lihat perenggan 33–39).

(2) Pemilikan revolver tersebut adalah tidak penting atau berkaitan dengan pertuduhan terhadap A1. Hakim bicara berpuas hati dengan keterangan bahawa SP5 dan SP7 adalah saksi yang boleh dipercayai dan keterangan mereka menunjukkan bahawa A1 yang menarik pencetus tersebut dan keterangan ini tidak disanggah. Pihak pendakwaan tidak boleh dikatakan sebagai memnyembunyikan keterangan dengan tidak menawarkan Najmi Daniel kepada pihak pembelaan tetapi A1 tidak pernah memanggilnya sebagai saksinya. Oleh itu, hakim bicara adalah tidak khilaf kerana tidak membangkitkan anggapan berbalik terhadap pihak pendakwaan kerana tidak memanggil Najmi Daniel sebagai saksi pendakwaan (lihat perenggan 46–50).

(3) Walaupun kenyataan Najmi Daniel kepada polis bahawa A1 telah memintanya untuk menyimpan revolver tersebut tidak boleh diterima sebagai bukti kerana dia tidak pernah dipanggil untuk memberi keterangan, mahkamah bersetuju dengan pihak pendakwaan bahawa tiada dinyatakan di dalam alasan penghakiman hakim bicara menunjukkan bahawa beliau telah bergantung kepada maklumat yang diberikan oleh Najmi Daniel untuk menabitkan A1 untuk pertuduhan tersebut. Oleh itu, tiada merit dalam isu yang dibangkitkan oleh A1 ini (lihat perenggan 52–53).

(4) Berkenaan dengan kenyataan A1 kepada polis bahawa dia memberikan revolver kepada Najmi Daniel untuk disimpan, laporan yang mengandungi kenyataan tersebut tidak pernah ditunjukkan kepadanya ketika dia memberi keterangan, oleh itu perkara yang dikatakan oleh A1 tidak sepatutnya dimasukkan ke dalam keterangan atau dipertimbangkan oleh mahkamah bicara (lihat perenggan 54).

(5) Tindakan A1 dalam membawa polis kepada penemuan revolver tersebut

boleh diterima di bawah s 27 Akta Keterangan 1950 ('AK'). Walaupun maklumat yang dibekalkan oleh A1 tidak boleh diterima di bawah s 27, keterangan bahawa A1 telah menunjukkan tempat dari mana revolver tersebut ditemui adalah relevan dan boleh diterima di bawah s 8 AK. Keterangan pihak pendakwaan juga telah membuktikan bahawa revolver tersebut adalah yang digunakan semasa melakukan kesalahan dalam kes ini. Sabitan A1 adalah selamat berdasarkan semua keterangan (lihat perenggan 58–59, 61 & 63).]

**Cases referred to**

*Amathevelli a/p P Ramasamy v PP* [2009] 2 MLJ 367, FC (refd)
*Fairoz Azman bin Amironzuki lwn Pendakwa Raya* [2021] 2 MLJ 771; [2021] 1 LNS 108, CA (refd)
*Khua Kian Keong and another v PP* [2003] SGHC 238; [2003] 4 SLR 526, HC (folld)
*Low Soo Song v PP* [2009] 3 MLJ 36; [2009] 3 CLJ 309, FC (folld)
*Munusamy v PP* [1987] 1 MLJ 492, SC (folld)
*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, FC (refd)
*PP v Ong Poh Cheng* [1996] 4 MLJ 279; [1996] 1 CLJ 501, HC (refd)
*Siew Yoke Keong v PP* [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)

**Legislation referred to**

Evidence Act 1950 ss 8, 27, 114(g)
Firearms (Increased Penalty) Act 1971 ss 2, 3, Schedule
Penal Code ss 378, 390

**Appeal from:** Criminal Suit Nos 45D-1–03 of 2016 and 45D-1–05 of 2016 (High Court, Shah Alam)

*N Sivananthan (Sivananthan) for the appellant.*
*Ku Hayati bt Ku Harun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Hashim Hamzah JCA:**

INTRODUCTION

**[1]** Ahmad Farid bin Mohamad Nasir ('the first appellant'), Khairul Ikhwan bin Mohammad Kassim ('the second appellant'), and Nik Mohd Zain bin Nik Mat ('the third accused') were jointly charged under s 3 of the Firearms (Increased Penalty) Act 1971 (Act 37) ('the FIPA 1971'). The charge reads:

'Bahawa kamu pada 5 Januari 2014, jam lebih kurang 11.45 malam di KM 7.5, Lebuhraya SKVE menghala ke Kajang, dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah melepaskan tembakan daripada sesuatu senjata api

dengan niat hendak menyebabkan kematian kepada Nazaruddin bin Harun (No. Kpt: 781219-06-5357) semasa melakukan kesalahan berjadual iaitu rompakan dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 3 Akta Senjata Api (Penalti Lebih Berat) 1971 dan boleh dihukum di bawah seksyen yang sama.

THE PROSECUTION'S CASE

**[2]** On 5 January 2014 at around 11.45pm, Nazaruddin bin Mat Ali ('SP5') was driving a Honda Accord bearing registration number WVY 75. His wife, Alawiyah bt Harun ('SP7') was also in the car. They were on their way home from Shah Alam to Kajang. When they arrived at KM 7.5 SKVE Expressway heading towards Kajang1 their car was hit from behind by a Toyota Wish.

**[3]** SP5 then stopped his car at the roadside. He went out of the car to have a look. The Toyota Wish also came to a complete stop behind SP5's car. Two people, later identified as the first and second appellants, came out from the Toyota Wish.

**[4]** Upon inspection, SP5 noticed a dent in the car's rear bumper. SP5 went to talk with the first appellant. He demanded cash from the first appellant for the damage to the car. While SP5 was still inspecting his car, the first appellant suddenly got into SP5's car and the second appellant hurriedly went back inside the Toyota Wish.

**[5]** SP5 quickly went towards the first appellant. He tried to pull the door and the first appellant's shirt. It was during this time SP5 noticed that the first appellant was holding a gun in his right hand. The first appellant then shot SP5 near his waist, causing him to fall backwards. SP5 managed to get up again. He then went towards his car to save his wife. However, he failed. The car sped off while his wife was still inside. The Toyota Wish followed them from behind. SP5 was left alone at the scene. He contacted his brother, Mohd Shukri bin Mat Ali @ Ibrahim ('SP4') for help. SP4 immediately called the emergency line, 999.

**[6]** Then, SP5 walked to the nearest petrol station. SP5 found a passer-by and asked him for help. SP5 was immediately brought to Hospital Serdang. When SP4 arrived at the scene, he did not find SP5 there. SP4 was later informed by SP5 that he was already at the hospital.

**[7]** Dr Vanessa a/p Subramaniam ('SP22') was on duty in the Emergency Department, Hospital Serdang on that day. At around 12.30am, SP5 was brought to the critical zone in the emergency department. SP22 was informed that SP5 had sustained an injury to his abdomen. Upon examination, SP22

discovered that there was a wound of approximately 3cm at the left lumbar region but there was no active bleeding. She also noted a bullet caught along with SP5's underwear. The bullet was extracted and handed over to the police. SP5's wound was treated, and he later underwent surgery.

**[8]** Dr Kathrina bt Lamat ('SP17') was the one who prepared SP5's medical report ('P77') based on the case notes. In P77, the diagnosis was gunshot injury with the entry wound at the left lumbar and exit wound at the left buttock.

**[9]** On the other hand, SP5's wife was left at an unknown place. She was rescued by the police and brought to Bandar Baru Bangi Police Station. The car was later found abandoned at a traffic light intersection near Seksyen 4 Tambahan, Bandar Bangi, Selangor.

**[10]** Azrai bin Abdul Hamid ('SP19'), a taxi driver, was in Restoran lmpian Maju, Seksyen 4 Tambahan, Bandar Baru Bangi. At about 1.30am to 2am on the same day, he was approached by the first appellant to hire his taxi. SP19 later dropped the first appellant in front of a 7–11 outlet in Equine Park, Seri Kembangan upon the first appellant's request.

**[11]** On 13 January 2014 at around 3.12am, the first appellant was arrested at No 69, Kampung Punggol, Kenali, Kubang Kerian, Kelantan. The first appellant led the police to Lot 2381, Taman Paduka Mukim Wakafkan, Kota Bharu, Kelantan where a Smith & Wesson revolver ('P46A') was recovered. P46A was handed over by one Najmi Daniel bin Ahmad Farid @ Ahmad Fariq ('Najmi Daniel') to the police together with some bullets ('P45A (1–4)') and a bullet shell ('P458').

**[12]** Sjn (B) Wahid bin Basri ('SP8') who was in charge of the lbu Pejabat Polis Daerah Sepang's Armory Division at the material time, conducted a serviceability test on P46A, P45A (1–4) and P45B. He found that they were in good condition and P46A was capable of discharging live 357 Magnum bullets.

**[13]** ASP Somcad a/l Damset ('SP11'), a ballistics analyst, confirmed that a bullet discharged from P46A during his examination was characteristically similar to the bullet discharged at the scene of the crime.

FINDINGS OF THE TRIAL JUDGE

**[14]** At the end of the prosecution case, the learned trial judge found that the prosecution had successfully established a prima facie case against the first and second appellants but not the third accused. The third accused was acquitted and discharged at the end of the prosecution case whereas the first and second

appellants were called to enter their defence.

*The first appellant's defence*

**[15]** The first appellant did not deny being at the scene of the crime on the day and at the time as per the charge. However, he denied robbing SP5 and discharging any firearm toward SP5.

**[16]** According to the first appellant, on the day in question, there were five people inside the Toyota Wish including the second appellant the third accused and him. The other two were 'Khairul Anuar' and 'Aris'. Aris was the one who was driving the car. Suddenly, Khairul Anuar instructed Aris to follow a gold coloured Honda Accord and Aris did as instructed. Aris then bumped the car from behind.

**[17]** Then, according to the first appellant, Khairul Anuar, Aris and he went out of their car. Khairul Anuar was the one who had spoken with SP5. Khairul Anuar then instructed the first appellant to pull out the Honda Accord's car keys to turn off the car's engine. This, according to the first appellant, was to prevent SP5 from fleeing. The first appellant went inside the car, had a sit on the driver's seat and closed the door. He was shocked to see a woman in the front passenger's seat.

**[18]** Suddenly, the door was opened and SP5 kicked the first appellant. According to the first appellant, he suddenly heard a gunshot coming from outside of the car. He saw SP5 fell down and later get up again. Spooked, he quickly drove SP5's car away and later left SP7 on the roadside nearby.

*Findings of the trial judge*

**[19]** At the conclusion of the trial, the learned trial judge found that the first and second appellants failed to raise any reasonable doubt on the prosecution's case and that the prosecution had successfully proven its case against the first and second appellants beyond a reasonable doubt. Both the first and second appellants were found guilty of the charge. They were convicted and sentenced to death.

THE APPEAL

**[20]** Aggrieved with the said decision, both the first and second appellants filed their respective appeals. The appeals were set for hearing before us. After hearing the appeals, we have come to a unanimous decision.

**[21]** We allowed the second appellant's appeal, hence the second appellant

was acquitted and discharged from the charge against him. The public prosecutor did not appeal against our decision.

**[22]** We however dismissed the first appellant's appeal and affirmed his conviction and sentence. The first appellant then filed an appeal to the Federal Court against our decision. This is the grounds for our decision regarding the first appellant's appeal.

*Grounds of the first appellant's appeal*

**[23]** Before us, learned counsel for the first appellant canvassed the following grounds of appeal and submitted that the conviction of the first appellant was not safe, namely that:

(a) the learned trial judge erred in failing to consider that the elements of robbery which formed the basis of the charge against the first appellant had not been proven by the prosecution;

(b) the learned trial judge erred in failing to invoke an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 (Act 56) ('the EA 1950') for their failure to call Najmi Daniel as prosecution witness; and

(c) the learned trial judge erred in admitting the evidence under s 27 of EA 1950 against the first appellant.

*First issue: Elements of scheduled offence (robbery)*

**[24]** The learned counsel submitted that the learned trial judge's failure to consider whether the elements of robbery have been proven by the prosecution amounts to a misdirection in law that warrants the acquittal of the first appellant.

**[25]** According to the learned counsel, there was no robbery committed when the firearm was discharged. The first appellant had merely completed the offence of theft by entering SP5's car and closing the door without the use of any force. It was further submitted that the discharge of the firearm against SP5 was separate and distinct from the act of theft of SP5's car. As such, the discharge of the firearm was only to facilitate the first appellant's escape due to SP5's attempt to remove the first appellant from SP5's car.

**[26]** In other words, the learned counsel submitted that the discharge of the firearm was committed after the commission of theft (which was not a scheduled offence), hence the elements under s 3 of the FIPA 1971 had not been established by the prosecution.

**[27]** We disagree with the learned counsel for the following reasons.

**[28]** Firstly, s 3 of the FIPA 1971 provides that:

> Section 3. Penalty for discharging a firearm in the commission of a scheduled offence.
>
> Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death.

**[29]** Section 2 of the FIPA 1971 defines 'scheduled offence' as any offence enumerated in the Schedule to the Act. The offence of robbery is included in the Schedule.

**[30]** Section 390 of the Penal Code defines robbery as:

> Section 390 Robbery
>
> (1) In all robbery there is either theft or extortion.
>
> (2) Theft is 'robbery', if, in order to commit theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.
>
> (3) Extortion is 'robbery', if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.
>
> Explanation — The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

**[31]** Section 378 of the Penal Code defines theft as:

> Section 378 Theft
>
> Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

**[32]** With regard to the elements that must be proven by the prosecution for an offence under s 3 of the FIPA 1971, we are guided by what has been decided by the Federal Court in *Low Soo Song v Public Prosecutor* [2009] 3 MLJ 36; [2009] 3 CLJ 309, where His Lordship Nik Hashim FCJ (as he then was) in citing with approval the decision of His Lordship Jeffrey Tan JC (as he then

was) in *Public Prosecutor v Ong Poh Cheng* [1996] 4 MLJ 279; [1996] 1 CLJ 501, held:

> [12] What the prosecution had to prove for the offence under s 3 against the appellant were:
>
> (a) *that there was a robbery committed by the appellant;*
>
> (b) *that the appellant at the time of his committing the robbery discharged a firearm; and*
>
> (c) *that the appellant intended to cause death or hurt to some person.*
>
> Be it noted that even if no hurt was caused by the discharge of the firearm, it is of no consequence to the offence.
>
> [13] The wordings of s 3 of the Act, in particular, 'any person who at the time of his committing ... a scheduled offence discharges a firearm' clearly means *that the prosecution must prove that it was the appellant who committed the act of robbery and had discharged a firearm whilst committing the offence*. Jeffrey Tan JC (as he then was) in *Public Prosecutor v Ong Poh Cheng* [1996] 4 MLJ 279; [1996] 1 CLJ 501 had the opportunity to interpret the phrase 'at the time of his committing' at p 291 (MLJ); p 510 (CLJ):
>
> > That s 3 is a penal provision is beyond any argument, and its meaning, giving it a strict interpretation, as is the rule, to penal provisions, must therefore be narrowly construed. The natural meaning of the words 'at the time of his committing the offence' emphasizes the time of the commission of the offence and specifies the discharge of a firearm before the completion of a scheduled offence. The choice in the language — the present participle — was deliberate and reflected the legislature's intention to have severely punished the commission of a scheduled offence, but only if a firearm was discharged during but not after the offence.
>
> In our judgment, the learned judicial commissioner's interpretation of the phrase is correct. It may be noted that *Ong Poh Cheng*'s case went on appeal to the Court of Appeal and the High Court's decision was upheld (see [1998] 4 MLJ 8; [1998] 4 CLJ 1) and a further appeal to the Federal Court (Wan Adnan CJ (Malaya), Dr Zakaria Yatim FCJ, Chan Nyarn Hai JCA) was dismissed vide Mahkamah Persekutuan Rayuan Jenayah No 05–9–98 (P) dated 24 November 1998. However, there was no written judgment of the Federal Court. (Emphasis added.)

**[33]** In determining whether the firearm was discharged by the first appellant whilst committing robbery, we are of the considered view that the whole incident should be viewed as a single transaction as this court has earlier decided in *Fairoz Azman bin Amironzuki lwn Pendakwa Raya* [2021] 2 MLJ 771; [2021] 1 LNS 108. His Lordship Abdul Karim Abdul Jalil JCA in delivering the judgment of this court held:

> [15] Dalam rayuan ini, peguam terpelajar menyatakan pada masa tembakan dilepaskan, perayu sedang melarikan diri setelah rompakan selesai dilakukan. Hujahan ini amat meleset sekali dan tidak disokong oleh fakta jelas dalam kes ini.

A *Peguam seolah-olah membuat garisan muktamad tertentu tentang bilakah rompakan itu berlaku dan bilakah rompakan itu tamat atas dasar yang di luar skema perundangan ini. Pada hemat kami, keseluruhan peristiwa di sini hendaklah dilihat sebagai satu transaksi.* Tidak dinafikan perayu memasuki premis dengan tujuan untuk merompak dengan menggunakan senjata api. Fakta juga menunjukkan
B semasa perayu sedang hendak mengambil wang di bawah kaunter juruwang, dia telah dipeluk dari belakang oleh Terikul dengan tujuan untuk membanteras perbuatannya. *Apa yang jelas daripada keterangan P33 dan P34, akibat daripada tindakan Tarikul itu, yang kemudiannya dibantu juga oleh rakan-rakannya, pergelutan sengit telah berlaku dan ini telah mengheret semua mereka keluar dari kawasan dalam kaunter juruwang berkenaan. Apa yang jelas perayu telah cuba*
C *diberkas semasa hendak mengambil barangan atau wang di bawah kaunter dan tembakan dilepaskan oleh perayu semasa pergelutan dalam usaha untuk melepaskan dirinya daripada cengkaman Terikul. Semua ini berlaku semasa rompakan sedang dilakukan dan masih dalam kawasan premis berdekatan dengan kaunter bayaran.* Dilihat secara keseluruhan, semua transaksi ini membentuk satu transaksi dan
D *tembakan yang dilepaskan adalah amat jelas semasa sedang melakukan rompakan.* Tidak timbul langsung isu setelah rompakan telah selesai dilakukan dan semasa perayu sedang melarikan diri. Kami mendapati hakim bicara telah menilai dan mempertimbangkan kedudukan ini secukupnya dan tidak melakukan apa jua kekhilafan untuk mewajarkan campur tangan kami. (Emphasis added.)

E

**[34]** Reverting to the facts of the present case, SP5's car was initially hit from behind by the Toyota Wish. SP5 and the first appellant both got out of their respective cars. While SP5 was still inspecting the rear side of his car, the first appellant suddenly got into the driver's seat of SP5's car. SP5 then tried to pull
F the first appellant out. He managed to open the door and grabbed the first appellant's shirt. It was at this time the firearm was discharged by the first appellant. It was discharged when SP5 tried to pull the first appellant out from his car. The whole incident was witnessed by SP7. After shooting SP5, the first appellant immediately drove away SP5's car.

G

**[35]** The first appellant in his defence did not deny that SP5 was shot when he tried to open the door and attempted to remove the first appellant from the car. The first appellant however denied having shot SP5 and claimed that he was shot from the outside.

H

**[36]** Nonetheless, we found the defence version to be highly incredible. Based on the evidence, we found that SP5 suffered a gunshot injury with an entry wound at the left lumbar and an exit wound at the left buttock. Based on the gunshot injury, we can safely conclude that SP5 was shot from the front. It
I is therefore ludicrous to suggest that SP5 was shot from the side or from behind, thus negating the first appellant's defence that SP5 was shot from the outside of the car. At the time when the firearm was discharged, SP5 was undoubtedly facing the first appellant and his own car since he was trying to pull the first appellant out of his car from the driver's seat. There was nobody

else inside SP5's car except the first appellant and SP5's wife. Considering the position of the first appellant and SP5 together with the gunshot injury suffered by SP5, we can safely conclude that SP5 was shot by none other than the first appellant.

**[37]** We are satisfied based on the evidence that the firearm was discharged at the time when the offence of robbery is being committed. The offence of robbery was completed when the first appellant drove away SP5's car after shooting him. The first appellant was not merely trying to escape when he shot SP5.

**[38]** In addition, the fact that the first appellant discharged the said firearm towards SP5 clearly indicates the first appellant's intention was to cause death or serious injury to SP5.

**[39]** Therefore, we hold that the elements of the charge under s 3 of the FIPA 1971 have been duly established by the prosecution, as correctly found by the learned trial judge. There was no misdirection on the part of the learned trial judge and as such, there is no merit to this issue raised by the learned counsel.

*Second issue: Adverse inference against the prosecution for their failure to call Najmi Daniel to give evidence*

**[40]** The learned counsel further submitted that the trial judge had erred in not invoking an adverse inference under s 114(g) of the EA 1950 against the prosecution for their failure to call Najmi Daniel as a prosecution witness. The relevant provision reads:

> Section 114 Court may presume existence of certain fact.
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume —
>
> ... (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it ...

**[41]** With regard to the application of s 114(g) of the EA 1950, we are primarily guided by the decision of the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, where His Lordship Mohamed Azmi SCJ (as he then was) in delivering the judgment of the court held:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration *can only be drawn if there is*

A *withholding or suppression of evidence* and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or f*or non-production of not just any witness but an important and material witness* to the case. (Emphasis added.)

B **[42]** We also agree with what has been decided by the Singapore High Court in *Khua Kian Keong and another v Public Prosecutor* [2003] SGHC 238; [2003] 4 SLR 526, where Yong Pung How CJ (Singapore) held:

C [34] Clearly this is a discretionary and not a mandatory inference: *Chua Keem Long v PP* [1996] 1 SLR 510, *Chia Sze Chang v PP* [2002] 4 SLR 523 and Satli bin Masot. The appellate court has to evaluate if the trial judge had exercised his discretion correctly. *Strict criteria have been stipulated before this adverse inference can be drawn against the Prosecution, namely that*:

D [(a)] *the witness not offered was a material one*: *Chua Keem Long*, *Lau Song Seng v PP* [1998] 1 SLR 663 followed by *Satli bin Masot*;

[(b)] *the prosecution was withholding evidence which it possessed and which was available*: *Ang Jwee Herng v PP* and *Amir Hamzah bin Berang Kuty v PP* [2003] 1 SLR 617 and

E [(c)] *this was done with an ulterior motive to hinder or hamper the defence*: Ang Jwee Herng, *Wong Leong Chin v Public Prosecutor* [2001] 1 SLR 146 and Chia Sze Chang.

[35] The court is generally reluctant to draw this inference against the Prosecution. I explained the rationale in *Chua Keem Long*:

F The discretion conferred upon the prosecution cannot be fettered by any obligation to call a particular witness. What the prosecution has to do is to prove its case. It is not obliged to go out of its way to allow the defence any opportunity to test its evidence. It is not obliged to act for the defence. (Emphasis added.)

G **[43]** We are also mindful of what has been decided by the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, where His Lordship Edgar Joseph Jr FCJ (as he then was) held:

H With respect, it is difficult to see how there could be justification for invoking the presumption under illustration (g) of s 114 of the Evidence Act 1950 against the Intervener/Purchaser for having failed to call the brokers. Illustration (g) says this: 'The court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it'. *There was no evidence that the Intervener/Purchaser had 'withheld' the testimony of the brokers; there had merely been an omission to call them.* (Emphasis added.)

I **[44]** According to the learned counsel, the failure of the prosecution to call Najmi Daniel as a witness creates a gap in the prosecution case since the issue of the ownership of P46A remains unanswered. This in turn results in reasonable doubt as to who had shot SP5.

**[45]** The learned deputy on the other hand contended that the prosecution had successfully proven all the elements of the charge even without the evidence of Najmi Daniel.

**[46]** We have gone through the appeal records, and we agree with the learned deputy. We are of the view that the ownership of P46A is not material nor relevant to the charge against the first appellant.

**[47]** The learned trial judge was satisfied based on the evidence of positive identification by SP5 and SP7 and the credibility of their evidence that it was the first appellant who pulled the trigger. On this issue, the learned trial judge found:

> Meneliti kepada keterangan kedua-dua saksi penting ini, mahkamah memutuskan yang keterangan dari mereka merupakan keterangan dari saksi-saksi yang kredible. Keterangan SP5 yang disokong oleh keterangan isterinya, SP7, adalah merupakan keterangan dari saksi yang jujur dan bukan memberikan keterangan dengan mereka-reka cerita. Walaupun diasak dengan pelbagai soalan, keterangan mereka berdua ini tidak berganjak dan kekal meyakinkan. Keterangan yang ditampilkan melalui mereka berdua ini jelas membuktikan penglibatan tertuduh (1) secara aktifnya ... yang menunjukkan tertuduh (1) telah menembak SP5 ...

**[48]** The learned trial judge, who had the audio and visual advantage to observe the demeanour of the witnesses was clearly entitled to his findings with regard to the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown the findings were perverse and against all available evidence. In the present case, we see no reason to disturb the finding of the learned trial judge above.

**[49]** Furthermore, there was no issue of withholding evidence because the prosecution did offer the witness to the defence. The first appellant was accorded every opportunity to call Najmi Daniel as his witness, but he did not do so.

**[50]** For the above reasons, we hold that there is no misdirection on the part of the learned trial judge when he did not invoke an adverse inference under s 114(g) of the EA 1950 against the prosecution for the non-calling of Najmi Daniel as a prosecution witness.

*Third issue: Information leading to discovery under s 27 of the EA 1950*

**[51]** The learned counsel submitted that the learned trial judge erred in admitting the evidence under s 27 of the EA 1950 against the first appellant, and in particular:

A (a) Najmi Daniel's statement in the police report (exh P111) that the first appellant had asked him to keep P46A; and

(b) the first appellant's words that he had given P46A to Najmi Daniel to be kept as can be seen in the police report (exh P124).

B

**[52]** At the outset, we agree with the learned counsel that the information given by Najmi Daniel should not have been admitted and considered by the court, as the maker of the statement or the giver of the information was· not called to give evidence. It was hearsay at best.

C

**[53]** However, the learned deputy contended that there was nothing in the learned trial judge's grounds of decision to show that the information by Najmi Daniel was relied upon in his finding of the first appellant's guilt. We went through the appeal records, and we agree with the learned deputy. For this reason, we see no merit in this issue.

D

**[54]** Next, the learned counsel submitted that the purported statement made by the first appellant in exh P124 should not have been admitted in evidence and should not be considered by the court. According to the learned counsel, SP27 (Insp Mohd Aidil bin Shafie) who was the maker of exh P124 was not asked or shown exh P124 when he was giving evidence. After going through the appeal records, we agree with the learned counsel on this issue.

E

F **[55]** It is trite that the information given under s 27 of the EA 1950 is not required by law to be in writing. It follows that any written record of the information given by the accused will not by itself be substantive evidence of its contents. Therefore, the information supplied by the accused must be proved by oral evidence.

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**[56]** In the case of *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367, His Lordship Arifin Zakaria CJ (Malaya) (as he then was) in delivering the judgment of the court held:

H [29] However, that is not the end of the matter in so far as the admissibility of the information supplied by the appellant is concerned. *The only evidence adduced by the Prosecution of the information is the record of it as contained in P51. SP12 did not give any oral evidence of it*. In commenting on the manner of giving evidence of information received under s 27, Augustine Paul J (as he then was) said in *Public Prosecutor v Hashim bin Hanafi* at pp 185–186:

I

> *Information given under s 27 is not a matter that is required by law to be in writing so as to be governed by ss 91 and 92 of the Act. Therefore the information must be proved by oral evidence pursuant to s 60(b) of the Act. Thus a written record of the information given by the accused will not by itself be substantive evidence of its contents and it is what the witness deposes in court as having been said by the accused*

*that will be evidence* (see Bhagirath). Where the information is contained in a police diary it can only be used for the purpose of refreshing memory (see *Public Prosecutor v Er Ah Kiat* [1966] 1 MLJ 9; [1965] 1 LNS 136). Where it is contained in any other document it can, at the highest, serve only as evidence of corroboration. It is on this basis that a report prepared by a chemist pertaining to his analysis of drugs cannot be tendered as substantive evidence of its contents but only as corroboration of his oral evidence in court under s 157 of the Act (seePublic Prosecutor*Saw Thean Teik v R* [1953] MLJ 124; [1952] 1 LNS 121; *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170). The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible (see *DPP v Hester* [1972] 3 All ER 1056). Its role is to confirm other evidence in the sense that it renders that other evidence more probable (see *Doney v R* [1990] 171 CLR 207; *DPP v Kilbourne* [1973] AC 729). It cannot therefore amount to that other evidence itself. Thus the record of an information will only enhance the credibility of the witness and the absence of it cannot render the oral evidence of it inadmissible; nor can it be a substitute for the evidence that it is meant to corroborate.

[30] It is therefore clear that *there must be oral evidence of the information given. P51 cannot be a substitute for it. Accordingly, we hold that P51, the information supplied under s 27 by the appellant, is inadmissible.* (Emphasis added.)

**[57]** In the appeal records, it can be seen from the oral evidence of SP27 that after the first appellant was arrested and interrogated, he led (*pandu arah*) SP27 and his team to the place where the P46A was recovered. The following can be seen from the evidence of SP27:

S: Selepas menjalankan tangkapan terhadap kesemua OKT satu dan juga tiga. Adakah kamu ada jalankan apa-apa siasatan terhadap mana-mana OKT?

J: Ada.

S: Adakah kamu ingat kamu jalankan siasatan terhadap siapa?

J: Terhadap nama Ahmad Farid.

S: Adakah kamu ingat mana dan bila siasatan itu dijalankan?

J: Di Balai Polis Kubang Kerian.

S: Bila?

J: Pada 13/01/2014 jam leblh kurang 3.40 pagi.

S: Hasil daripada siasatan terhadap OKT 1. Adakah kamu ada rampasan apa-apa barang kes?

J: Ada.

S: Adakah kamu ingat barang kes ini yang dirampaskan?

J: Satu pucuk pistol.

S: Adakah kamu ingat bila masa dia, barang kes itu dirampas dan di mana barang kes itu dirampas?

J: Barang kes itu dirampas pada 13/01/2014 jam lebih kurang 4.15 pagi di lot 2381 Taman Paduka Mukim Wakafkan Kota Bahru.

S: Semasa buat rampasan terhadap pistol tersebut adakah kamu sendiri yang rampas ataupun diserahkan oleh sesiapa?

J: Saya sendiri yang rampas setelah diberitahu oleh penama satu lelaki orang Melayu nama dengan panggilan NIA atau nama seingat Najmi Daniel.

S: Semasa pergi membuat rampasan ini, adakah OKT1 turut serta?

J: Turut serta.

S: Adakah kamu pergi ke tempat rampasan ini hasil dari arah pandu arah OKT 1 atau macam mana?

J: Hasil daripada pandu arah OKT 1 Ahmad Farid.

**[58]** We are of the view that the conduct of the first appellant in leading the police to the discovery of P46A is admissible under s 27 of the EA 1950. In the case of *Siew Yoke Keong v PP* [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC, His Lordship Ahmad Maarop FCJ (as he then was) in delivering the judgment of the Federal Court held:

> [28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information ...

**[59]** Irrespective of whether the information supplied by the first appellant is inadmissible under s 27 of the EA 1950, we found that there was sufficient evidence to show that the first appellant had pointed out the place where P46A was discovered. This evidence is relevant and admissible under s 8 of the EA 1950.

**[60]** In the Federal Court case of *Amathevelli a/p P Ramasamy*, His Lordship Arifin Zakaria CJ (Malaya) (as he then was) in delivering the judgment of the court held:

> [31] The inadmissibility of the information supplied by the appellant does not affect the admissibility of the evidence of her subsequent conduct under s 8 of the Evidence Act 1950 irrespective of s 27. As Chinnappa Reddy J said in *Prakash Chand v State AIR* 1979 SC 400 at p 404:
>
> > *The evidence of the circumstances, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapon which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under s 8 of the Evidence Act*, irrespective of whether any statement by the accused contemporaneously will or antecedent *to* such conduct falls within the purview of s 27 of the Evidence Act (vide *Himachal Pradesh Administration v Om Prakash* AIR 1972 SC 975). (Emphasis added.)

**[61]** Based on the facts of the present case, P46A was confirmed to have been used during the commission of the offence evidenced by the serviceability and ballistic examinations.

**[62]** For the foregoing reasons, we are of the view that there is no merit in this issue.

CONCLUSION

**[63]** In conclusion, after careful perusal of the appeal records, and hearing the submissions of all parties, we have come to a unanimous decision that there is no misdirection committed by the learned trial judge in his decision. We also found that the learned trial judge did not err both in fact and in law in arriving at the said decision and we see no reason to disturb the same. We are also of the view that having taken in totality the evidence adduced, the conviction against the first appellant is safe. Accordingly, the first appellant's appeal is dismissed, and the learned trial judge's decision is hereby affirmed.

*A1's appeal dismissed and his conviction and sentence affirmed; A2's appeal allowed and acquitted and discharged of the charge.*

Reported by Ashok Kumar